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No. 82-

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

JERRY LAIN BEHELER,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are Miranda warnings required whenever police have probable cause to arrest a suspect even though the individual is not under arrest, voluntarily comes to the police station, and is allowed to leave without hindrance after a brief taped interview?

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OPINION BELOW

The Opinion of the California Court of Appeal, Fifth Appellate District, an unpublished 1982 decision numbered 5 Crim. 5136, appears as Appendix "A" to this Petition.

JURISDICTION

The petitioner, the People of the State of California, respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Fifth Appellate District, which was entered in this proceeding on December 16, 1982, and modified January 12, 1983. The Court of Appeal denied respondent's petition for rehearing on January 12, 1982 (Appendix "A," Modification). The decision became final as to that court on February 11, 1983 (Rules 24(a) and 28, California Rules of Court). The California Supreme Court denied the People's petition for hearing on February 10, 1983 (Appendix "B"). On February 15, 1983, the state district court stayed the issuance of the remittitur through March 2, 1983 (Appendix "C"). The remittitur issued on March 2, 1983 (Appendix "D").

This Court's jurisdiction is invoked under 28 United States Code section 1257(3).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . ."

United States Constitution,

Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Respondent Beheler was convicted by jury in the Superior Court of the State of California, in and for the County of Tulare, of crimes in two counts: first degree murder with one special circumstance (killing in the attempted commission of an enumerated felony) and attempted robbery. The jury found a

principal was armed with a firearm in the commission of both offenses (Cal. Pen. Code, §§ 187, 190.2(a)(17)(i), 211, 664, and 12022(a)). (CT 141, 203-205.)

Upon conviction, respondent Beheler was sentenced to life imprisonment without possibility of parole with a two-year concurrent sentence for attempted robbery and a one-year enhancement for the firearm use. (CT 208, 209-211.)

The Court of Appeal of the State of California, Fifth Appellate District, by unpublished decision filed December 16, 1982, and modified January 12, 1983, reversed respondent's judgment of conviction on all counts. The State Court held respondent was not properly advised of his constitutional rights pursuant to Miranda v. Arizona (1966) 384 U.S. 436 prior to a taped interview in which he confessed his involvement in the crime under investigation (Appendix "A").

The People's petition for rehearing was denied on January 12, 1983, when the court modified the opinion (Appendix "A," Modification). Although three judges voted in favor of granting a hearing, the California Supreme Court denied hearing on February 10, 1983 (Appendix "B").

B. Statement of Facts

During the late evening hours of February 20, 1980, Peggy Dean - a pseudo drug dealer - was shot to death in the parking lot of the Palms Liquor Store in Bakersfield, California.

A few hours after Dean was killed, respondent had his next-door neighbor contact the Kern County Sheriff's Office (RT 86-87; ART 10). When Deputy Lantz first arrived, respondent wanted to discuss "the circumstances surrounding the shooting" (ART 4-5, 11).

As the conversation continued, respondent admitted being present when Dean was shot. He said Daniel (Dee Dee) Chavez, Roscoe (Rocky) Howard, Jr., and Daniel Wilbanks (respondent's half brother) were also in the car (RT 88, 92). Danny Wilbanks fired the fatal shot. Respondent said Wilbanks shot Ms. Dean for "no apparent reason" (RT 88; ART 5, 11).

Respondent said the gun used in the shooting - a. 357 magnum - was somewhere in his backyard. The car used to transport them to and from the scene was parked next to the house. He gave officers permission to search his car and the yard area (RT 89-90; ART 5, 13).

A senior officer asked Deputy Lantz to take Beheler to the sheriff's office for more interviews. Lantz explained this to respondent, asked if he had any objection to going to the sheriff's office, and

specifically told him he was not under arrest. Respondent agreed to go. He said he wanted to bring the investigation to a conclusion as soon as possible (RT 91; ART 6).

Without being advised of his rights, respondent was interviewed at the sheriff's office in the homicide detail interview room (RT 109; ART 16). He was not restrained, and, initially, he was not even regarded as a suspect. The first interview lasted from 2:23 a.m. to 2:36 a.m. Respondent left the interview room. The interviewer called him back for another brief series of questions. The second interview concluded at 2:53 a.m. The entire episode consumed no more than 30 minutes. The officer advised respondent his statement would be evaluated by the district attorney. Respondent was permitted to return to his residence (RT 109-111; ART 16-17, 18).

Five days later, on February 26, 1980, respondent was arrested. He was advised of and waived his Miranda rights and gave a second detailed, taped confession (ART 18-19, 20). During that interview the following exchange occurred (CT 22):

> "Q. Jerry, this is my second interview with you.
>
> "A. Yes sir.
>
> "Q. The other interview as taken, uh, early morning hours of 2-21-80. And that interview was as a result of a call you made to the Sheriff's Office with the information, uh, as to who had killed the girl at Palm Liquor Store.
>
> "A. Yes sir.
>
> "Q. We responded to your address at that time. You were extremely cooperative, you gave us permission to search your car, your residence, the yard.
>
> "A. Yes sir.
>
> "Q. And then you voluntarily came down to the Sheriff's Office and gave a statement I believe regarding the offense.
>
> "A. Yes sir."

The trial court concluded the Miranda warnings were not required prior to the first statement. Both statements were admitted at trial (ART 27).

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ARGUMENT

THE WARNINGS REQUIRED BY MIRANDA V. ARIZONA DO NOT APPLY TO EVERY ENCOUNTER BETWEEN THE POLICE AND A SUSPECT; WHEN RESPONDENT, UNDER NO OFFICIAL COMPULSION WHATSOEVER, CHOSE TO SPEAK WITH SHERIFF'S OFFICERS, HIS VOLUNTARY DECISION DID NOT RAISE ANY ISSUE UNDER THE FIFTH AMENDMENT, AND MIRANDA WARNINGS WERE NOT REQUIRED

Relying on this Court's opinion in Miranda v. Arizona (1966) 384 U.S. 436, the California Court of Appeal has erroneously concluded respondent should have been advised of his Miranda rights before the interview with police authorities on February 21, 1980. The key holding of the Fifth District Court of Appeal in reversing respondent's conviction was the court's conclusion that the February 21 interview constituted a "custodial interrogation."

The Court of Appeal's misinterpretation of Miranda involves substantial questions of a recurring nature relating to the Fifth and Fourteenth

Amendments, and the application of Miranda by lower courts.

The opinion is a classic example of the lower courts' relentless and unjustifiable expansion of Miranda principles. These courts are rapidly obliterating the carefully defined limits of the original decision.

The state court's decision is wrong. If it is allowed to stand, a self-confessed murderer may be freed. But, the decision has wider and more significant implications. In Miranda, this Court examined coerced confessions and concluded compulsion was the evil to be avoided. The Fifth District, on the other hand, has examined a voluntary confession and concluded confessions are the evil to be avoided.

By shifting the focus of the Miranda analysis from compulsion to police suspicion - the existence of probable cause -

the state court rips Miranda completely loose from its own doctrinal moorings (Fare v. Michael C. (1978) 439 U.S. 1310, 1314 (Rehnquist J., Circuit Justice)). In Miranda, this Court said explicitly:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . . There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." [Footnote omitted.] (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478.)

The state appellate court's opinion expands Miranda far beyond its logical scope. In Miranda the focus of concern was the inherently coercive nature of an interrogation conducted by isolating the

suspect, against his will, with police officers. Thus, unless officers comply with Miranda's procedural safeguards, the suspect's statements are barred as "compelled."

> "It was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicion at the time the questioning was conducted, which led the court to impose the Miranda requirements with regard to custodial questions" (Beckwith v. United States (1976) 425 U.S. at pp. 346-347, quoting with approval from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473).

All Miranda's safeguards, which are designed to eliminate coercive police tactics, rest on a scenario of overbearing compulsion caused by isolation of a suspect in police custody (United States v. Washington (1977) 431 U.S. 181, 197, fn. 5). Custodial interrogation means questioning initiated by law enforcement officers after a

person has been taken into custody or otherwise deprived of his freedom of action in any significant way (Rhode Island v. Innis (1980) 446 U.S. 291, 298). When a suspect voluntarily comes to the police station, is specifically told he is not under arrest, and is allowed to leave without hindrance after a half hour interview, he is clearly not in custody or otherwise deprived of his freedom of action in any significant way (Oregon v. Mathiason (1977) 429 U.S. 492, 495). Obviously, if a person is not in custody and acts voluntarily, Miranda warnings are not required since the element of compulsion is entirely lacking (Oregon v. Mathiason, supra, 429 U.S. at p. 495). When a citizen is under no official compulsion whatever, either to speak or to remain silent, his voluntary decision to do one or the other, does not raise any issue under the Fifth Amendment

(Jenkins v. Anderson (1980) 447 U.S. 231, 244, Stevens, J., Conc.).

The Fifth Amendment does not automatically preclude self-incrimination, whether spontaneous or in response to questions by government officials (United States v. Washington, supra, 431 U.S. 181, 186). Indeed, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. (Id., at p. 187.) Absent some officially coerced self-accusation, the Fifth Amendment is not violated by even the most damning admissions (ibid).

This Court justified its admittedly expansive interpretation of the Fifth Amendment on the ground that the inherent compulsion of lengthy, incommunicado interrogation represented the kind of official coercion prohibited by the privilege against self-incrimination. It was that sort of coercive environment to which Miranda by

its terms is made applicable, and to which it is limited (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

In its opinion in this case, the state court correctly explains that the requirement of "Miranda" warnings is necessary to dispel the "coercion inherent in an environment of incommunicado-police-dominated interrogation." (Appendix "A," at p. 9.) It also correctly states that the central issue in this case is whether or not appellant was "in custody" during the initial questioning on February 21, 1980 (id., at p. 10).

However, in holding that appellant's interview on February 21 was a "custodial interrogation," the Fifth District Court relies on four factors set forth in People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 (ibid). As explained in Herdan, these factors are:

> "(1) the site of the interrogation; (2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of the questioning." [Fns. omitted.]

In applying these "factors," the court found that the investigation had focused on the appellant and that the questioning was designed to elicit incriminating statements and was, therefore, an interrogation (Appendix "A," at pp. 15-17, 18-19). The court examined the indicia of arrest and found appellant was told he was not under arrest, the officers believed he was not "in custody," and appellant believed he was not "in custody" during the interview. From this, the state district court concludes "there was little indicia of arrest present" and "this factor does not balance heavily toward appellant" (Appendix "A," pp. 17-18). The opinion did not indicate whether or not the site of the interrogation, the sheriff's

office, was inherently coercive, but stated the site was not "dispositive" (id., at p. 14). The court then concluded that its analysis of these factors indicated that respondent had not proven that appellant's confession was voluntary beyond a reasonable doubt (id., at p. 20).

The appellate court's analysis and result is patently contrary to this Court's decision in Oregon v. Mathiason, supra, 429 U.S. 492. In that case, based on facts very similar to the facts in the instant case, this Court concluded the defendant was not "in custody" and did not have to be advised of his Miranda rights.

In Mathiason, a burglary suspect responded to a request that he contact the police. He agreed to talk to an investigator at the police station. When the suspect arrived, the investigator advised him he was not under arrest. They entered an office,

closed the door, and sat down across a desk from each other. The investigator explained he believed the suspect was involved in a burglary and falsely stated that his fingerprints had been found at the scene. After a few minutes, the suspect admitted his involvement in the burglary. He was advised of his Miranda rights and gave a taped confession. The officer again told him he was not under arrest. He said the district attorney would decide whether to file charges. The suspect was released and allowed to return home (Oregon v. Mathiason, supra, 429 U.S. at pp. 493-494).

The Oregon Supreme Court reversed the defendant's conviction since he had been interrogated in a "coercive environment" without being advised of his Miranda rights (id., at p. 494).

This Court disagreed. The opinion re-emphasized a fundamental principle: the

warnings required by Miranda do not apply to every encounter between the police and a suspect (Oregon v. Mathiason, supra, 429 U.S. at p. 494). Rather, the Miranda requirements are limited to interrogations occurring after a person has been taken into custody or otherwise deprived of freedom in a significant way (Oregon v. Mathiason, supra, 429 U.S. at p. 494). In the absence of a "formal arrest or restraint of any movement," other factors such as the location of the questioning, the level of suspicion, and the nature of the questioning do not trigger Miranda warnings (Oregon v. Mathiason, supra, 429 U.S. at p. 495). Thus, Miranda only applies to the "coercive environment" created when a suspect's freedom has been restricted to the point of being "in custody" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

Mathiason reflects this Court's scrupulous regard for the precise dictates of

Miranda v. Arizona, supra, 384 U.S. 436. The latter case carved out a special exception to the constitutional test of admissibility for confessions and admission (id., at p. 457). Prior to Miranda, the court examined the "totality of the circumstances" surrounding a confession to determine if it was freely and voluntarily given without compulsion or inducement (see, e.g., Haynes v. Washington (1963) 373 U.S. 503, 513-514). In Miranda, the court held a confession resulting from "custodial interrogation" would be inadmissible unless the prosecution demonstrated the use of procedural safeguards which effectively secured the suspect's privilege against self-incrimination (Miranda v. Arizona, supra, 384 U.S. at pp. 444, 457, 478).

The court defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has

been taken into custody or otherwise deprived of his freedom of action in any significant way" (Miranda v. Arizona, supra, 384 U.S. at p. 444). Essentially, this was a situation in which suspicion had focused on a particular person to such an extent that authorities had chosen to restrain that person for further questioning (id., at p. 444, fn. 4).

The court recognized that a suspect involuntarily held, controlled, or confined in an intimidating "police-dominated atmosphere" that suggests the "invincibility of the forces of law" and "the complete subjugation of the suspect to the will of the examiner" might find it difficult to resist the prolonged pressure to confess (Miranda v. Arizona, supra, 384 U.S. at pp. 446-457). Confessions under such circumstances are inherently compelled absent evidence that the interrogators have taken "appropriate

safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." (Id., at p. 458.) The "core virtue" of the Miranda decision was its simplicity and precision in instructing the police and courts on the conduct of "custodial interrogations" (Fare v. Michael C. (1979) 442 U.S. 707, 718; Fare v. Michael C., supra, 439 U.S. 1310, 1314 (Rehnquist, J., in chambers; Miranda v. Arizona, supra, 384 U.S. at p. 468).

Mathiason meticulously confines Miranda's application to the most intense of encounters between investigators and an accused -- the interrogation of a suspect who has been involuntarily held, controlled, or confined by the authorities and whose freedom to depart is restricted in a significant way. Miranda was not meant to exclude admissions and confessions made by a suspect, such as respondent in this case, who voluntarily

appears at the police station and willingly answers police questions without being placed in custody. The police do not have to stop a person who wishes to confess to a crime (Miranda v. Arizona, supra, 384 U.S. at p. 478). Such encounters do not inherently nullify a person's will to resist or freedom of choice.

Yet, despite the similarities between Mathiason and the instant case, the lower court came to the opposite conclusion. Its analysis requires police officers to consider immaterial factors rather than simply relying on whether or not a suspect was actually in custody. The result is the exclusion of evidence voluntarily provided by the respondent when he was not subjected to the "inherent coercion" or "overwhelming compulsion" of a Miranda-type custodial interrogation.

In assessing whether respondent was in custody on February 21, the appeals court said the "focus or probable cause" factor is "no longer dispositive" but is significant and "entitled to great weight." Indeed, the state court dwells lovingly and at great length on the information officers had before interviewing appellant. While acknowledging the site of the interrogation was also not dispositive, the court expressed concern that the police did not inform respondent of the "seriousness of his position" (Appendix "A," at p. 15).

> "A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal liability. . . . While appellant and his other cosuspects may not have been aware of the felony-murder rule, indeed, the officers in the instant case most certainly were." (Emphasis added.)

Thus, it is clear from the state court's own analysis of the record that

appellant acted voluntarily albeit possibly in ignorance of the true implications of his statement.

The state court also decided the police had sufficient cause to arrest respondent before they interviewed him on February 21. According to the state district court, the existence of probable cause is a significant factor in determining whether a suspect is "in-custody." Moreover, the court's finding that the questioning constituted an "interrogation" designed to elicit incriminating responses is based on their assessment of the information officers had before interviewing respondent (Appendix, "A," at p. 19).

However, the strength or content of the government's suspicions at the time the questioning is conducted is irrelevant for Miranda purposes (Beckwith v. United States, supra, 425 U.S. at p. 346, citing with

approval from United States v. Caiello (2nd Cir. 1969) 420 F.2d 471, 473; see also United States v. Jimenez (7th Cir. 1979) 602 F.2d 139, 145, fn. 7, and cases cited therein).

Any interview with an officer who suspects the interviewee's guilt will have its "coercive aspects," but that does not trigger the Miranda requirements (Oregon v. Mathiason, supra, 349 U.S. at p. 495; People v. P. (N.Y.App. 1967) 286 N.Y.S.2d 225, 230). An "interrogation" cannot "bootstrap" the status of a suspect to that of "custody." 1/

The Miranda requirements are not to be imposed simply because "the questioned person is one whom the police suspect" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

---

1. Rhode Island v. Innis, supra, itself states that "custody" and "interrogation" are separate concepts. Where custody is conceded, the court must determine independently whether the suspect was interrogated (id., at p. 300).

Indeed, to rely on "probable cause to arrest" in determining "custody" is contrary to the express language of the Miranda decision. [2/] In its opinion, this Court explicitly stated that by "focus of suspicion" it meant that a person had been interrogated after being "taken into custody or otherwise deprived of his freedom of action in any significant way" (Miranda v. Arizona, supra, 384 U.S. at p. 444, fn. 4). (Emphasis added.) The use of the word "significant" is not mere surplusage. (See People v. P., supra 286 N.Y.S.2d at p. 234.) To require that the Miranda warnings be given whenever an officer has probable cause to arrest, is to render the "deprivation of

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2. Rhode Island v. Innis, supra, 446 U.S. at p. 301, emphasizes that the Miranda safeguards were "designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (Emphasis added.)

freedom" language meaningless. Just because an investigator has probable cause to arrest does not mean that a suspect is automatically being subjected to the anxieties and inherent coercion of being involuntarily held by the police. Surely, the respondent in this case, who was not restrained and never led to believe that his freedom to depart was restricted in any way, was not under such compulsion.

In short, Mathiason holds that neither "focus of suspicion" nor the nature of the questioning alone or in combination are sufficient to render a suspect "in custody," absent other evidence of "significant" restraint. As the appeals court opinion itself concedes, such other restraint was absent in this case.

The "core virtue" of Miranda - its establishment of clear, precise, and specific guidelines - is eviscerated by requiring

investigating officers to assess and weigh a variety of immaterial factors. Miranda's promise that its requirement would not "constitute an undue interference with a proper system of law enforcement" (Miranda v. Arizona, supra, 384 U.S. at p. 481) is broken. The prosecution is deprived of relevant, valuable, and constitutionally admissible evidence.

The court in this case specifically found respondent was told he was not under arrest and the officers who interviewed him did not consider him to be in custody. When respondent gave a second statement after being advised of his Miranda rights, he agreed he was not in custody during the first interview (Appendix "A," at pp. 17-18).

To summarize the salient facts: the officers did not take respondent into custody; he came to the stationhouse voluntarily; he was not arrested; he was not

restrained; he was in no way compelled to make a statement; he was permitted to leave when the interview was over. The interview lasted less than 30 minutes. Respondent's experience did not approach the level of inherent coercion evident in a true "custodial interrogation."

Under these circumstances, the facts in the instant case are even more compelling than the facts in Mathiason. "[T]here is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way" (Oregon v. Mathiason, supra, 429 U.S. at p. 495).

The Herdan analysis relied on by the state appeal's court does not conform to the dictates of Miranda v. Arizona, supra, 384 U.S. 436 (Oregon v. Mathiason, supra, 429 U.S. at p. 495). In fact, it is remininiscent of the "coercive environment" analysis

rejected in Mathiason. Therefore, opinions such as the one in the instant case needlessly hamper law enforcement by perpetuating an erroneous approach in determining the point at which Miranda warnings are required.

The Fifth District Court of Appeals has imposed a Miranda requirement based on factors which have nothing to do with compulsion. Appellant was never subjected to the persistent pressure of an actual custodial interrogation.

The court's decision makes Miranda admonitions obligatory in noncustodial, non-coercive contexts that do not suggest the "invincibility of the forces of the law" nor "the complete subjugation of the individual to the will of his examiner" (Miranda v. Arizona, supra, 384 U.S. at pp. 450, 457).

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Petitioner respectfully submits that a writ of certiorari should issue to review the decision of the Fifth District Court of Appeal in the State of California.

Respectfully submitted,

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April 1, 1983

APPENDIX -- (Opinion dated December 16, 1982, 5 DCA)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	5 Crim. No. 5136 (Superior Court No. 20967) O P I N I O N

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

Quin Denvir, State Public Defender, under appointment by the Court of Appeal, and Julia Cline Newcomb, Deputy State Public Defender, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant

Attorney General, Arnold O. Overoye, Assistant Attorney General, Eddie T. Keller and Janice Rogers Brown, Deputy Attorneys General, for Plaintiff and Respondent.

This is an appeal from a judgment of conviction of attempted robbery and murder (Pen. Code, §§ 664, 211 and 187.)

Appellant, Jerry Lain Beheler, and codefendants were charged with violations of Penal Code sections 664, 211 (attempted robbery) and 187 (murder). As a special circumstance, it was alleged that appellant was either engaged in, or was an accomplice to, an attempted robbery within the meaning of Penal Code section 190.2, subdivision (a)(17)(i). It was also alleged that a principal was armed with a firearm within the meaning of Penal Code section 12022, subdivision (a).

The court granted separate trials for appellant's codefendants. Daniel Chavez,

one of the original codefendants, was granted immunity and testified against appellant.

The jury found appellant guilty on both counts and found the alleged special circumstance and enhancement to be true.

FACTS

On February 20, 1980, appellant, Jerry Beheler, stayed home drinking beer, talking and playing dominoes with some friends. During the day, he and his friends made alternate trips to the nearby Palm Liquor store to buy more beer. On one of these trips, appellant and a friend named Keith were approached in the parking lot of the liquor store by Peggy Dean who asked Keith if he was interested in buying hashish. Appellant testified that he refused Dean's offer as he did not have enough money. After purchasing several quart bottles of malt liquor, appellant and his friend Keith returned home to continue the domino game.

Sometime in the late afternoon, appellant, his step-brother, Danny Wilbanks, and Roscoe Howard drove to Daniel Chavez' house. Chavez and Howard were long-time neighbors and good friends. Chavez had only known appellant for a short time.

Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams.

At appellant's home, Daniel Chavez noticed that Howard had a 357 magnum pistol with him. He recognized the gun as it belonged to Howard's father. While at the house, Chavez, Howard and appellant discussed returning to the liquor store and threatening Peggy Dean with the gun to get the hash. Others testified that appellant

come up with the idea. Chavez testified that he and Howard did not want to threaten Peggy Dean with the gun. They actually discussed several plans for taking the hash. After Chavez, Howard and appellant decided they did not want to do the act, Wilbanks volunteered. Chavez said that appellant was too drunk to do it anyway. Wilbanks got the gun and started flashing it around. He took all the bullets out except one and said he only needed one. Howard told him not to be joking with the gun, took it from him and then reloaded it.

With Danny Wilbanks driving appellant's car, all four men left the house and headed for the liquor store. Chavez was in the front passenger seat. Appellant was in the rear seat behind Wilbanks. Howard sat behind Chavez. Wilbanks, with the gun on his lap, drove into the parking lot on the south side of the liquor store. Two women and a

man were sitting on the bumper poles along the south side of the store. Peggy Dean got up and walked over to the car. She said, "I didn't think you guys were going to show up." She handed Danny Wilbanks a foil-wrapped bindle the size of a marble and told him she had "twelve more in her hand." Ms. Dean leaned in the car window and observed the gun on Wilbanks' lap. She asked what the gun was for. Chavez told her it was for protection. Wilbanks pulled out the gun and pointed it at Ms. Dean and said, "Let me have it all." Ms. Dean recoiled and stepped back from the window and said to Wilbanks, "You're not going to use that on me."

Chavez and Howard urged Wilbanks to leave the place with the one bindle he had. Appellant was still sitting silently in the back seat. Despite the warning, however, Wilbanks pulled the trigger. The bullet struck Peggy Dean just above her right eye,

passed through the soft tissue of the brain and out of the back of her skull. She crumpled to the pavement and a flow of bindles spilled from her hand.

Ms. Dean's companions were still sitting on the curb posts, immobile. A pickup truck pulled into the parking lot and Chavez reached over and turned on the ignition. He told Wilbanks, "Let's get out of here." Wilbanks put the car in gear and drove off. He drove erratically--skidding and stopping--back to appellant's house.

Back at the house, they told appellant's wife about the murder. Wilbanks, while crying, repeatedly stated that he had killed Ms. Dean.

Appellant's memory of the events at the liquor store was quite limited. He remembered hearing a loud report from a gun. He lifted his head in time to catch a glimpse of a gun. Then he saw a woman slowly turn

around and fall to the ground. He did not recall the conversation in the car. He did not remember the drive home. But he did remember arriving back at the house.

Appellant told Wilbanks that he would have to leave. Chavez and Howard told everyone not to mention this to the police, "Nobody knows nobody, man." Chavez and Howard took the gun into appellant's backyard to hide it. They then took off running along the railroad tracks. Howard disposed of the bullets along the way.

Howard and Chavez first went to Chavez' house where Chavez changed his shirt. Then they went next door to Howard's house. Later, they walked to a friend's house and spent the night.

Appellant and his wife went to a neighbor's house and briefly related the story. They called the police who arrived almost immediately. Deputy Lantz, who was

investigating the scene at the Palm Liquor store parking lot, was ordered to respond to the neighbor's residence. Appellant informed him that his brother had killed the woman at the Palm Liquor store parking lot and that the gun was in his backyard somewhere. Appellant gave the officers permission to search his yard and his automobile. The gun was found in the backyard. It was hidden under some leaves and brush and wrapped in a yellow cloth.

Later in the early morning hours of February 21, appellant agreed to go to the sheriff's office for a more detailed interview. In addition, he took the sheriff's officers to the houses on Churchill Drive where Roscoe Howard and Daniel Chavez lived.

At the sheriff's department, appellant gave the investigators a detailed taped statement. The taped statement was

introduced into evidence. Appellant told the officers his half brother, Danny Wilbanks, had shot a woman in the parking lot of the Palm Liquor store. He gave the officers several details regarding the alleged incident. At one point, the taped interview concluded.

The officers then called appellant back into the interview room to ask him some more questions. The officers got appellant to reaffirm that Danny Wilbanks had a 357 magnum gun which he had gotten from Roscoe Howard. The officers asked appellant why he got the pistol from Howard at that time. Appellant responded, "it was for the purpose of robbery." Appellant admitted that the plan was to go down to the Palm Liquor store and take the "dope" away from Peggy Dean. Appellant admitted that he knew the purpose of going to the Palm Liquor store was to rob Peggy Dean of hashish. The officers asked

appellant why he went along with Wilbanks to go rob Peggy Dean. Appellant replied, "I'm his brother. I mean, if there's a way that I knew that I could have kept him from doing what he did I would have done it, if I'd have known that he was fixing to do what he had done I could have prevented it. This was just something that was unforeseen." The officers also got appellant to admit that Roscoe Howard and Daniel Chavez knew about the robbery but that "None of us had any idea that he was going to kill this lady." The officer specifically asked appellant, "But they had an idea that he was going to rob her?" Appellant replied, "Well, they knew that he was going to take her hashish." After the interview, appellant was returned to his home.

Later that day, appellant called Roscoe Howard and Daniel Chavez and convinced them to cooperate with law enforcement

officials. They also agreed to come to the sheriff's office. Their statements were tape recorded.

Several days later, the four men were arrested. Appellant, Howard and Chavez waived their Miranda rights at that time and each gave a second tape-recorded statement substantially corroborating each other.

DISCUSSION

I

Appellant contends that the admission of his tape-recorded statements constitutes reversible error because he was in custody at the time he gave those statements. [1/] He stresses that because suspicion had focused on him at the time of

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1. During the trial, a hearing was held outside the presence of the jury and the court found that the first taped statement "was voluntary and did not need to have a Miranda." Appellant's first non-Mirandized statement was thus ruled admissible as well as his second Mirandized statement made shortly after his arrest.

the first taped statement and the site of the interrogation was at the police station, he "was in custody at the time of his tape recorded interrogations." He contends that the police had probable cause to arrest him at the time of the first taped interrogation. Moreover, he argues that the length and form of questioning "clearly supports a finding of custodial interrogation." We agree.

In Miranda v. Arizona (1966) 384 U.S. 436, 467-473, the United States Supreme Court held that to insure that any statement a suspect makes in a custodial interrogation setting is a product of his free will, the interrogation must be surrounded by certain essential procedural safeguards:

> "[B]efore any questioning begins the police must give the suspect the now-familiar 'Miranda warnings,' advising him primarily of his right to remain silent and to have the assistance of counsel . . .; to be valid, any waiver thereof must be both knowing and intelligent; and the questioning must terminate if the suspect directly or

indirectly invokes any of these rights." (People v. Pettingill (1978) 21 Cal.3d 231, 237.)

The reason for Miranda's requirement of express advisement of rights is to dispel the coercion inherent in an environment of incommunicado-police-dominated interrogation. (Miranda, supra, at pp. 457-458.) The prosecution has the burden of establishing the voluntariness of a defendant's statement beyond a reasonable doubt. (People v. Jimenez (1978) 21 Cal.3d 595.) Absent proof beyond a reasonable doubt of proper advisement and valid waiver of rights, any admission or confession obtained is deemed coerced. (People v. Murtishaw (1981) 29 Cal.3d 733, 753, mod. 29 Cal.3d 836a.) The trial court's ruling on a Miranda issue may not be set aside by an appellate court unless it is "palpably erroneous." (In re Eric J. (1979) 25 Cal.3d 522, 527.) Moreover, as to conflicting testimony, the appellate courts

must accept the version of events most favorable to the People to the extent that it is supported by the record. (People v. Jackson (1980) 28 Cal.3d 264, 300; People v. Jimenez, supra, 21 Cal.3d 595, 609.) However, where the facts are uncontradicted, the reviewing court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753; People v. Jimenez, supra, 21 Cal.3d at p. 609.)

A succinct summary of when the procedural safeguards as set out in Miranda come into play is found in People v. Murphy (1982) 127 Cal.App.3d 743, 747-748:

> "The procedural safeguards set out in Miranda protecting the Fifth Amendment right against self-incrimination come into play only when 'custodial interrogation' is involved. (384 U.S. at p. 444 [16 L.Ed.2d at pp. 706-707]; People v. Farris (1981) 120 Cal.App.3d 51 [174 Cal.Rptr. 424]; People v. Blouin (1978) 80 Cal.App.3d 269, 283 [145

Cal.Rptr. 701].) 'Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody."' (Oregon v. Mathiason (1977) 429 U.S. 492, 495 [50 L.Ed.2d 714, 719, 97 S.Ct. 711].) 'While arrest is not a condition precedent to the right to Miranda and Dorado [People v. Dorado (1965) 62 Cal.2d 338, 358-364 (42 Cal.Rptr. 169, 398 P.2d 361)] warnings, custody is: the vice requiring the prophylaxis of the notice of rights is the inherently coercive atmosphere pervading custodial interrogation. [Citation.]' (People v. Leach (1975) 15 Cal.3d 419, 443 [124 Cal.Rptr. 752, 541 P.2d 296].)

"Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' (Miranda v. Arizona, supra, 384 U.S. at p. 444 [16 L.Ed.2d at p. 706].) In California, it is well settled that custodial interrogation can occur without a formal arrest. It exists where the defendant is either 'physically deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived.' (People v. Arnold (1967) 66 Cal.2d 438, 448 [58 Cal.Rptr. 115, 426 P.2d 515]; People v. Farris, supra, 120 Cal.App.3d at p. 56.) It has been said: 'When an arrest has not yet taken place, the factors considered in deciding whether custody has attached are many. Among the most important are: (1) the site of the interrogation;

(2) whether the investigation has focused on the suspect; (3) whether the objective indicia of arrest are present; and (4) the length and form of questioning.' (People v. Herdan (1974) 42 Cal.App.3d 300, 306-307 [116 Cal.Rptr. 641], fns. omitted; see also People v. Blouin, supra, 80 Cal.App.3d at p. 283; People v. Arnold, supra, 66 Cal.2d at p. 449.)" (Emphasis added.) 2/

Whether appellant was in custody during the initial questioning is the central issue in this case. The test of custody

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2. Prior to Miranda, courts focused on the factor of whether the investigation had begun to focus on a particular suspect. (Escobedo v. Illinois (1964) 378 U.S. 478; People v. Durado (1965) 62 Cal.2d 338.) Since Miranda, however, the test simply is whether the suspect is in custody. Focus on the suspect, however, remains an element in deciding whether custody has taken place. (See People v. Murphy, supra, 127 Cal.App.3d 743, 747-748, and cases cited therein.)

Also, it should be noted that although persons temporarily detained for investigation of crimes are actually deprived of their freedom of movement for the period of the detention, an investigatory on-the-scene detention does not constitute "custody" for the purposes of Miranda. (Miranda v. Arizona, supra, 384 U.S. at pp. 477-478; People v. Patterson (1979) 88 Cal.App.3d 742, 747.)

is not dependent upon the subjective intent of the interrogator. As noted above, the question is "whether the suspect was actually deprived of his freedom in any significant way or, as a reasonable person, was led to believe his freedom of movement was restricted by the pressures of official authority." (People v. Blouin (1978) 80 Cal.App.3d 269, 283.)

We begin our discussion by considering the facts in light of the suggested "four factor" test of People v. Herdan (1974) 42 Cal.App.3d 300, 306-307, to determine whether appellant was "in custody" when he made his taped statements to the sheriff's officers on February 21, 1980.

(1) The Site of the Interrogation.

In People v. Herdan, supra, page 307, footnote 9, the court noted that "Usually, interrogation at a police station is deemed inherently coercive, although this

is not the case if the suspect comes to the police station on his own initiative or voluntarily. (See People v. Hill (1969) 70 Cal.2d 678, 693-694. . . .)"

The California Supreme court has held a defendant's confession inadmissible where the defendant had voluntarily gone to the police station to give a statement and was not Mirandized in two significant cases. (People v. Arnold (1967) 66 Cal.2d 438; People v. White (1968) 69 Cal.2d 751.)

In People v. Arnold, supra, 66 Cal.2d 438, the court recognized that custody constitutes an essential element of the accusatory stage. In Arnold, the defendant was requested by the district attorney to come in for questioning. The district attorney was investigating the death of the defendant's child. The investigation strongly suggested that defendant was responsible for the death of her child. The

district attorney did not advise the defendant of her constitutional rights and he contrived a leading question to extract highly incriminating admissions. The court held in Arnold that the confession was inadmissible. (Id., at p. 450.) The determinative factor in Arnold was not that the defendant was being interrogated at the police station, but rather, that "The deputy district attorney had undertaken a process of interrogation that lent itself to eliciting incriminating statements." (Id., at p. 449.)

In People v. White, supra, the defendant voluntarily accompanied officers to the police station to make a statement about a murder. While he was there, information was obtained which focused suspicion on him. The officer confronted the defendant with the evidence and elicited a confession. The California Supreme Court held that the record showed custodial interrogation, noting that

the investigation had focused on the defendant, the officer did not intend to permit defendant to leave without explaining the evidence, and the officer's remarks were accusatory in tone. (People v. White, supra, 69 Cal.2d 751, 760-761.)

The California Supreme Court has also found a defendant's statements admissible where he had voluntarily gone to the police station to give statements and was not Mirandized. (People v. Hill (1969) 70 Cal.2d 678, 693-694; see also People v. Sam (1969) 71 Cal.2d 194, 201-202.) However, in Hill, the defendant's initial statements to the police were not in reply to questions designed to elicit incriminating responses and in Sam, the defendant was not even a suspect during the first two conversations with the police.

The United States Supreme Court has also addressed the issue of when a suspect is

entitled to Miranda warnings when he voluntarily comes to the police station for questioning. (Oregon v. Mathiason (1977) 429 U.S. 492.) Respondent here relies heavily on this case.

In Mathiason, supra, in response to a telephone call, the defendant, a parolee, voluntarily came to the police station for questioning about a burglary. The state police had investigated a burglary and asked the lady of the house if she suspected anyone. She replied that the defendant was the only one she could think of. The officers tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant's apartment with a note asking him to call. The next afternoon, the defendant did call. The officer asked where it would be convenient to meet and the defendant had no preference. The defendant

came down to the police station and was met by an officer in the hallway who shook hands with him and took him into an office. The officer advised him that he was investigating a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The defendant admitted that he had taken the property. At this point, he was advised of his Miranda rights and the officers took a taped confession. At the end of the taped conversation, the officer told the defendant he was not arresting him at this time and that he was releasing him to go about his job and return to his family.

The United States Supreme Court held that Miranda was inapplicable because Mathiason was not "'deprived of his freedom of action in any significant way.'" (Oregon v. Mathiason, supra, 429 U.S. at p. 495.) Respondent appears to contend that Mathiason

should be read for the proposition that anytime a suspect voluntarily comes to the police station to be questioned he would automatically not be in custody for purposes of Miranda. However, upon a close reading of Mathiason, we do not believe this to be the case.

Mathiason does not indicate that the totality of the circumstances should not be considered in determining when a suspect is in custody for purposes of Miranda. Rather, the court in Mathiason looked at all of the facts and concluded that in that case defendant was not in custody per Miranda. Indeed, the facts of Mathiason are quite dissimilar to the case at bar. Unlike the defendant in Mathiason, appellant here was questioned almost immediately after the crimes had occurred. He was extremely emotionally distraught. This was undisputed. On the other hand, the defendant in Mathiason

was not interviewed until 25 days after the burglary and he was not in an emotionally distraught stage. Moreover, the officers in the instant case had a great deal of information, primarily supplied by appellant himself, that appellant was guilty of attempted robbery and first degree felony murder at the time of his interview. On the other hand, the police in Mathiason called the defendant in for questioning because the victim of the burglary, when asked if she suspected anyone, replied that the defendant was the only one she could think of. (Oregon v. Mathiason, supra, 429 U.S. at p. 493.) This is not the same kind of information linking a suspect to a crime as the police had in the instant case. Additionally, the defendant in Mathiason was a parolee and knew it was incumbent upon him to cooperate with police.

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Appellant here was interrogated in a small room at a police station. Two officers were present. As stated above, usually an interrogation at a police station is deemed inherently coercive. However, as can be seen, this is not always the case, especially if the suspect comes to the police station on his own initiative or voluntarily. Consequently, the site of the interrogation factor in determining whether appellant was in custody during the February 21 interview, while relevant, in our opinion is not dispositive. Many factors may have played a part in appellant's decision to come to the police station, not the least of which is the fact that the police failed to inform him of the seriousness of his position. A reading of the record clearly indicates that appellant cooperated with the police feeling that as long as he was not the one who shot the gun he would not suffer serious criminal

liability. In addition, the police seized upon the emotion of the moment and encouraged appellant to talk. He was obviously suffering the effects of alcohol and extremely emotionally distraught. While appellant and his other cosuspects may not have been aware of the felony-murder rule,[3/] indeed, the officers in the instant case most certainly were.

(2) Whether the Investigation had Focused on the Suspect.

As was discussed, supra, the fact that the police investigations had focused on the defendants in People v. White and People v. Arnold, supra, was significant in the court's determination that the defendants in those cases were in custody. Although no longer the sole determinative factor, whether

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3. Indeed, the prosecutor argued to the jury that appellant was ignorant of the rule.

an investigation has focused on the suspect is still a significant factor in determining when a suspect is "in custody" for the purpose of Miranda. (People v. Murphy, supra, 127 Cal.App.3d 743, 747-748.)

Not only does appellant contend that he was entitled to Miranda admonitions because the investigation had focused on him prior to the February 21 interview, [4/] but he contends that he was entitled to have Miranda

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4. Before the officers took appellant to the police station for further questioning, Detective Lanz testified that "we stood in the yard near his doorway for some time discussing the shooting and the circumstances immediately after the shooting." Lanz informed appellant that they would prefer to interview him in depth concerning the circumstances surrounding the shooting at the sheriff's department. Lanz testified he asked appellant if he had any objection and that he explained to appellant he was not under arrest, but that going down to the sheriff's department "would merely facilitate a speedy conclusion to the interview." According to Lanz, appellant agreed to go down to the sheriff's department because "it was his desire to bring the investigation to a conclusion as soon as possible." (Emphasis added.)

warnings because there was probable cause to arrest him at the time of his interview, citing In re James M. (1977) 72 Cal.App.3d 133. However, the real focus in a Miranda case is not when probable cause to arrest occurs. Probable cause involves both an objective and a subjective standard. The test of custody is not dependent upon the subjective intent of the interrogator. Rather, the fact of probable cause is merely one aspect to consider in determining whether a defendant's Miranda rights have attached.

> "True, probable cause to arrest, like arrest itself, may play a significant role in the application of the rule but, unlike the case of actual arrest, probable cause to arrest is not in all cases, synonymous with the restraint contemplated by the Miranda doctrine." (People v. Blouin, supra, 80 Cal.App.3d 269, 283.)

The sheriff's officers in the instant case had a substantial amount of information implicating appellant in the attempted robbery-homicide before they

conducted their first taped interview on February 21. Indeed, they knew from appellant himself that: he and the others had discussed robbing the victim at appellant's home; they drove to the liquor store to rob the victim of her hashish; Wilbanks had fired the fatal shot; the suspects had driven in appellant's car; and the gun was found hidden in appellant's backyard.

Clearly, the officers knew by the time of their first interview with appellant at his home that appellant was involved, at least as an accomplice, in the attempted robbery of Peggy Dean. Likewise, they knew full well that appellant was undoubtedly implicated in the felony murder of Peggy Dean.

From our reading of the record, it is clear that the investigation had focused on appellant, among others, before the

February 21 interview conducted at the police station, and further, the police had sufficient information to constitute probable cause to arrest appellant.

Moreover, the officers initially ended the first taped interview and then called appellant back in. At this point, they specifically interrogated him concerning his knowledge of the plan to rob Peggy Dean and his knowledge of the purpose for the gun. Appellant freely admitted his knowledge and participation in the attempted robbery and yet, even at this point in the interview, the police officers did not Mirandize appellant.

Even though the "focus or probable cause" factor is no longer dispositive, by itself, of the "in-custody" issue, we conclude that on the above facts it is significant and entitled to great weight.

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(3) Whether the Indicia of Arrest Were Present.

Appellant was interviewed in an interrogation room at the sheriff's department. Two officers were present. As mentioned, supra, the officers testified he was told he was not under arrest and the officers believed that he was not "in custody" at the time of the interview. Whether the officers believed that he was in custody or not is irrelevant. Later when appellant gave his second Mirandized statement after he was arrested, he was asked if he agreed with the statement that he was not in custody during the first interview. Appellant stated that he agreed with that assessment. Appellant did not testify at the hearing and his trial counsel did not cross-examine the sheriff's officers on this point. Instead, appellant's trial counsel concentrated on the voluntariness argument

because appellant was extremely emotionally distressed and obviously under the effect, at least to some degree, of alcohol at the time of his interview.

Appellant was permitted to leave at the end of the interview. However, Detective Ray told appellant that he wanted members of the district attorney's office to read the transcribed statements and make a decision as to whether arrest would be made. From the record, we cannot tell whether he was in fact told not to leave Bakersfield.

In our opinion, there was little indicia of arrest present on the February 21 interview other than the fact that the interview took place at the sheriff's station. Thus, we conclude this factor does not balance heavily toward appellant.

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(4) The Length and Form of Questioning.

Obviously, the longer the interview and the more accusatory in tone the interview is, the more likely a suspect will be deemed to be in custody pursuant to Miranda. Appellant's taped interview lasted approximately 30 minutes. Moreover, he had been extensively interviewed at home prior to the interview at the sheriff's department. Generally, interrogation pursuant to Miranda refers to questioning or conduct designed or likely to produce incriminating responses. (Rhode Island v. Innis (1980) 446 U.S. 291.) There is no doubt in the instant case the interrogation of appellant on February 21 was designed to produce incriminating responses. Before the officers interrogated appellant on tape they knew he was involved in the attempted robbery and/or homicide of the victim. Indeed, appellant himself had

supplied that information. It is quite apparent from a reading of the transcript that the questions were designed to elicit incriminating responses. Appellant was asked about the plan to rob Peggy Dean. Appellant was asked about his prior contact with her. Indeed, appellant gave the officers many details regarding the incident in question. Appellant admitted that he knew Wilbanks had a gun. He admitted he knew the purpose was to rob Peggy Dean. He was specifically asked why he went along. Essentially, his response was that if he had known Wilbanks was actually going to use the gun he might have been able to prevent it. In essence, appellant confessed to felony murder.

On this record, we conclude that the form of the questioning of appellant during the February 21 taped interview was designed to elicit an incriminating response pursuant to Rhode Island v. Innis, supra, 446

U.S. 291. Respondent's contention that the questions were merely "investigative in nature, not accusatorial" is totally without merit. (See People v. White, supra, 69 Cal.2d 751, 760-761.)

As we have previously stated, the prosecution has the burden of establishing a voluntariness of the defendant's statement beyond a reasonable doubt. (People v. Jimenez, supra, 21 Cal.3d 595.) In the instant case, there appears to be no conflicting testimony on the Miranda issue. Where the facts are uncontradicted, the appellate court must independently determine beyond a reasonable doubt that the incriminating statement was properly admitted. (People v. Murtishaw, supra, 29 Cal.3d 733, 753.)

We conclude that respondent has not met its burden of establishing that appellant was not in custody during the February 21

interview. Furthermore, the incriminating statements from the February 21 interview should have been suppressed by the trial court. On the record before us, appellant essentially confessed to felony murder during the February 21 interrogation. A confession has been defined as "amounting to a declaration of defendant's intentional participation in a criminal act." (People v. McClary (1977) 20 Cal.3d 218, 230.) The improper introduction of a confession is reversible error per se. (People v. Randall (1970) 1 Cal.3d 948, 958.) 5/

Because of our decision on the Miranda issue, we find it unnecessary to address appellant's numerous other contentions at this time. These issues are

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5. This court recently reversed the conviction of Roscoe Howard, one of appellant's original codefendants. (People v. Howard (July 16, 1982) 5 Crim. No. 5181, hg. den.) The reversal was based on an almost identical Miranda violation.

either currently pending in the California Supreme Court, or are unlikely to arise again in any subsequent retrial of appellant.

For the reasons previously stated, the judgment is reversed and remanded for a new trial.

ZENOVICH
J.

WE CONCUR:

FRANSON
Acting P.J.

QUALL
J.*

* Assigned by the Chairperson of the Judicial Council.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JERRY LAIN BEHELER, Defendant and Appellant.	5 Crim. 5136 (Super. Ct. No. 20967) MODIFICATION OF OPINION ON DENIAL OF REHEARING

The opinion filed herein on December 16, 1982, is modified as follows:

On page 3, line 6, "Chavez testified" should be added after first full sentence and "However, appellant testified he refused the lady's offer as he did not have enough money" should be added at the end, so that the second paragraph on page 3 reads:

"Howard and appellant invited Chavez to come over to appellant's house to have a drink and smoke some hash. Chavez testified appellant said they had bought hash earlier from a lady at the Palm Liquor store and this lady was supposed to meet them at the store in one-half hour with an additional 50 grams. However, appellant testified he refused the lady's offer as he did not have enough money."

On page 21, the sentence should be stricken and the following inserted in its place:

"The judgment is reversed and remanded for a new trial charging appellant with no offenses greater than voluntary manslaughter. (See People v. Taylor (1974) 12 Cal.3d 686.)

The petition for rehearing is denied.

ZENOVICH
j.

I CONCUR:

FRANSON
Acting P.J.

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
5th District, Division __, Crim. No. 5136

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
F I L E D
FEB 10 1983
LAURENCE P. GILL, Clerk

Deputy

PEOPLE

V.

JERRY LAIN BEHELER

Respondent's petition for hearing DENIED.

Richardson, J., Kaus, J., and Broussard, J., are of the opinion that the petition should be granted.

BIRD
Chief Justice

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

Court of Appeal
Fifth Appellate District
F I L E D
FEB 15 1983
KEVIN A. SWANSON, Clerk
By _____ Deputy

THE PEOPLE, Plaintiff and Respondent, vs. JERRY LAIN BEHELER, Defendant and Appellant.	) 5 Crim. No. 5136)) (Super. Ct. No. 20967))))

BY THE COURT:

Upon motion of respondent, the issuance of the remittitur in the above-entitled matter will be stayed only until March 2, 1983, to allow respondent an adequate opportunity to request such a stay from the United States Supreme Court.

Dated FEB 15 1983

FRANSON Acting P.J.

I CONCUR:

ZENOVICH J.

Crim. 5136 FOOO633

IN THE Kern 20967

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIFTH APPELLATE DISTRICT

FILED
83 MAR 7 P 1:44
GALE S. ENSTAD, Clerk
Kern County, Calif.
By P. A. McGinnis, Deputy

THE PEOPLE,
Plaintiff and
Respondent,

v.

JERRY LAIN BEHELER,
Defendant and
Appellant.

5 Crim. No. 5136
Superior Court No. 20967

REMITTITUR ENTERED [196]

APPEAL from a judgment of the Superior Court of Kern County. John Michael Nairn, Judge. Reversed.

I, KEVIN A. SWANSON, Clerk of the Court of Appeal of the State of California, for the Fifth Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on December 16, 1982 and that this opinion or decision has now become final.

WITNESS my hand and the seal of the Court affixed at my office this 3rd day of March, 1983.

KEVIN A. SWANSON, Clerk
By Victoria C. Hernandez,
Deputy